No. 79-1356

In the Supreme Court of the United States

OCTOBER TERM, 1980

KATHY SUE JOHNSON, ET AL., PETITIONERS

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO SUGGESTION OF MOOTNESS

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On October 2, 1980, the Board of Education of the City of Chicago filed its Suggestion of Mootness based upon the entry of a consent decree in *United States* v. *Board of Education of the City of Chicago*, No. 80 C 5124 (N.D. Ill.) (S.M. A-3)[1] and the Board's decision of October 1, 1980 (S.M. A-18) to discontinue, at the end of the 1980-1981 school year, the Student Racial Stabilization Quota

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[1]"S.M." refers to respondent's Suggestion of Mootness. The United States, by letter of September 30, 1980, informed the Court of the entry of the consent decree and provided the Court copies of the complaint and the consent decree.

Plan (hereinafter referred to as "the Plan") at issue in this case. In our judgment the case is not now moot.

1. Neither the consent decree nor the decision to discontinue the Plan affects the operation of the schools during the current school year. Thus, the case is " 'live' " and the parties do not " 'lack a legally cognizable interest in the outcome.' *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969)." *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979).

2. The question remains whether the case may become moot (*cf. DeFunis* v. *Odegaard,* 416 U.S. 312 (1974)) and whether the possibility of future mootness warrants dismissal of the writ of certiorari. In our view, dismissal is not warranted.

The complaints in this case challenged the Plan because it resulted in the exclusion of the plaintiffs from integrated neighborhood high schools and their assignment to segregated and more distant high schools. The complaints sought declarations that the Plan was unconstitutional and injunctive relief forbidding further implementation of the Plan and requiring that excluded black students be allowed to enroll in Gage Park and Morgan Park. The complaints did not seek comprehensive changes to overcome the effects of past discrimination in Chicago's student assignment system. While they did not explicitly seek damages, they were brought under 42 U.S.C. 1983 and sought "such other and further relief, including costs and reasonable attorneys' fees, as this Court shall deem just and proper." Whatever the disposition of the plan, any damage claim would not become moot. *Watts* v. *Brewer*, 588 F. 2d 646, 648 (8th

Cir. 1978); *Davis* v. *Village Park II Realty Co.*, 578 F. 2d 461, 463 (2d Cir. 1978).[2]

In order for the injunctive claims to become moot, two conditions must be satisfied: (a) it must be possible to say with assurance that there is no reasonable expectation that the kind of discriminatory assignments challenged here will recur; and (b) events must "have completely and irrevocably eradicated the effects of the alleged violation," *i.e.*, the previously excluded students must receive relief. *County of Los Angeles* v. *Davis*, *supra*, 440 U.S. at 631.

The consent decree and prospective rescission of the Plan could satisfy those conditions in the future, but we are unable to state with certainty that they will. The consent decree itself is silent with respect to the disputed enrollment quota plan. It obligates the Board to develop a comprehensive student desegregation plan for implementation in the 1981-1982 school year following approval of the plan by the United States and the court. The Board is to present its comprehensive plan to the Court and the Justice Department by March 11, 1981, "except as [the time schedule is] modified by agreement between the Board and the Department of Justice or as extended by leave of Court" (S.M. A-17). If the parties do not agree on the contents of the plan, "the disagreement

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[2]Petitioners were not required to allege specifically any claim they might have for nominal damages. *Basista* v. *Weir*, 340 F. 2d 74, 87 (3d Cir. 1965). See *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978). Of course, the individual Board members would enjoy at least a qualified immunity from liability in damages where their actions were taken in good faith (*Wood* v. *Strickland*, 420 U.S. 308 (1975)), and an absolute immunity if they were deemed to have acted in a legislative capacity. See *Lake Country Estates, Inc.* v. *Tahoe Planning Agency*, 440 U.S. 391 (1979). The Board would not enjoy the same immunities, and a damage remedy could be available, unless this is a case in which "countervailing considerations" militate against such a remedy. *Owen* v. *City of Independence*, No. 78-1779 (Apr. 16, 1980), slip op. 28.

will be submitted to the court for resolution" (S.M. A-11). While we expect the content of the plan to be resolved expeditiously, the decree does not provide certainty as to when a fully acceptable plan will be in place.

The Board quotes "[t]he four 'Basic Objectives' of the desegregation plan" contemplated by the consent decree (S.M. 2). Because, in our view, the enrollment quotas here at issue violate the Equal Protection Clause (U.S. Brief 12-14), the United States would be unable to approve a desegregation plan incorporating their segregative features. We are unable to represent, however, that the district court would not approve such a plan.[3] Nor can we predict the impact of the comprehensive plan on those plaintiffs who have already been excluded from Gage Park and Morgan Park. This question is substantial, in light of Section 5.2 of the Consent Decree. If Gage Park and Morgan Park are treated as "already stably integrated,"[4] "the plan may exclude [them] from reassignment of students if the extent of integration is within a reasonable range of that to be achieved in the schools referred to in Sec. 2.1" (S.M. A-7).[5]

The rescission of the Student Racial Stabilization Quota Plan (S.M. A-18) increases the chances that the injunctive claim may become moot. However, it does not state how students are to be assigned in September 1981,

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[3]The decisions below could have a *stare decisis* effect if they are left standing.

[4]We do not view them as stably integrated, because the Board has already resorted to mandatory reassignment to maintain their racial composition.

[5]Section 2.1 states: "*Desegregated Schools*. The plan will provide for the establishment of the greatest practicable number of stably desegregated schools, considering all the circumstances in Chicago" (S.M. A-5).

except by reference to the consent decree in *United States* v. *Board of Education of the City of Chicago*, *supra*.

3. The judgment below should be vacated if this Court determines that circumstances render it inappropriate to decide the case on the merits. By vacating the judgment and remanding the case to the court of appeals, the Court would be acting in accord with its normal practice in cases in which developments subsequent to the grant of certiorari make it inappropriate for the Court to decide an issue thought worthy of review. *County of Los Angeles* v. *Davis*, *supra*; *Weinstein* v. *Bradford*, 423 U.S. 147 (1965); *Preiser* v. *Newkirk*, 422 U.S. 395 (1975); *Board of School Commissioners* v. *Jacobs*, 420 U.S. 128 (1975). *Cf. United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

It is therefore respectfully submitted that the case is not moot, but that if this Court decides not to reach the merits of this case, the judgment of the court of appeals should be vacated.

WADE H. MCCREE, JR.
Solicitor General

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